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IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]61

JOHN H. CRUMADY,

Petitioner,

v.

JOACHIM HENDRIK FISSHER, Her Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER,

Respondents,

v.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ABRAHAM E. FREEDMAN,
SIDNEY A. BRASS,
1415 Walnut Street,
Philadelphia 2, Pa.,
Counsel for Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John H. Crumady, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on September 30, 1957, reversing the judgment of the District Court of the United States for the District of New Jersey, in the appeal docketed in the said Court of Appeals as No. 12,139, and the order of the said court denying rehearing entered on December 5, 1957.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the District of New Jersey is reported at 142 F. Supp. 389 (Appellant's Appendix in Appeal No. 12,138, p. 16a). The opinion of the Court of Appeals for the Third Circuit is recorded in 249 F. 2d 818 (infra, p. 29). The opinion of the Court of Appeals on petition for rehearing is reported in 249 F. 2d 821 (infra, p. 36).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 30, 1957 (infra, p. 35). The order denying rehearing was entered on December 5, 1957 (infra, p. 37). The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where a shipowner engages a stevedore contractor to unload the ship's cargo, and said stevedore, in order to conduct the unloading operation, rigs the ship's gear in an improper, unseaworthy manner, as a result of which a cable breaks while the cargo is being unloaded, causing the boom to collapse and injure one of the longshoremen, can the shipowner escape liability because the dangerous instrumentality which caused the accident was rigged by the stevedore?

2. Where the findings of the trial judge are based on competent and substantial evidence, may the Court of Appeals reverse such findings by substituting its own judgment for that of the trial judge without a holding or showing that the findings are clearly erroneous?

STATEMENT OF THE CASE.

Petitioner, a longshoreman, was assisting in unloading a cargo of lumber from respondents' vessel, when one of the cables supporting the boom broke, causing the boom to fall upon petitioner and crush him to the deck, inflicting serious and grievous injuries. He brought this action in admiralty against the vessel and her owners, claiming that his injuries resulted from defective equipment and the negligence of the respondents. The vessel thereupon impleaded the stevedoring contractor as third party respondent.

The undisputed facts as found by the courts below disclose:

The respondent vessel "Joachim Hendrik Fisser" arrived in Port Newark, New Jersey, on January 2, 1954, with a cargo of lumber, and employed the Nacirema Operating Company, Inc., a stevedoring contractor, to discharge the lumber from the vessel. Before the operation during which the petitioner was injured, the stevedores set the boom and tackle in such position that, during the hoisting operation, a greater strain was imposed upon the cable that secured the boom to the mast than was imposed upon the other cables. All of the gear, including the boom and the cables and electric winch which supplied the power, had a rated safe work load capacity of *three* tons. The winch was equipped with a device which could shut off the power whenever the load being lifted exceeded any specified weight. The trial court found that this device had been improperly set by the vessel operators to cut the power in the winch when the load being lifted exceeded *six* tons, or twice the safe working load of the gear lifting the load. Prior to the accident, the stevedores were in the course of hoisting two timbers from a hold of the vessel, when one end of the timbers became wedged and caught under the hatch coaming. As the power in the winch increased the strain on the cables pulling the load, the cut-off device failed to shut off the power within the safe working limits of the gear, and the

increasingly excessive strain finally caused the topping lift to break. As a result, the boom fell upon the longshoreman.

The trial judge found from the evidence of lay and expert witnesses that the topping lift broke while it was under an excessive strain of 17 to 21 tons; that the winch was unseaworthy because the cut-off device was set at an excessively high level and placed an undue strain upon the working gear, far beyond its rated safe working capacity; that this factor combined with the unseaworthy condition of the rigging to cause the accident (App. 33a-35a). The trial court, accordingly, held the vessel liable to petitioner, and, further, held the impleaded respondent, Nacirema, liable over the vessel because of its defective rigging of the gear (App. 35a).

Nacirema appealed from the judgment against it, and the vessel then cross appealed from the judgment in favor of petitioner. The judgment in favor of petitioner was reversed by the Court of Appeals upon the ground that, although the cut-off device in the winch was set to shut off the power when the load was more than twice the safe rated capacity of the gear, this did not render the winch unseaworthy because the gear was assumed to have a factor of safety of five times its rated safe working capacity. Reasoning from this, the lower court, *in conflict with all the evidence,* said that the gear actually had a working capacity of *fifteen* tons and not merely three tons, the officially rated maximum safe working capacity.[1] Accordingly, the court reasoned further, a strain of six tons, twice the safe rated working capacity, "did not in itself create any undue risk of breakage." The Court of Appeals then concluded that

1. There is no evidence in the entire record to support this unique holding of the court below, inferentially or otherwise. All of the experts, including respondents', testified that the factor of safety refers to the *breaking* point of the gear and not its working capacity. Obviously, if the gear should be strained beyond its safe working load, as it approaches the breaking point irreversible changes take place. Such deterioration reduces the factor of safety and lowers the breaking point. All the evidence in the record contradicts the finding that the cable had a safe working capacity of fifteen tons.

the *sole* cause of the accident was the defective rigging. Since this had been set by the stevedores, the court completely exonerated the vessel.

Petitioner moved for rehearing upon the ground that the vessel must be held liable even if the sole cause of the accident was the defective rigging, regardless of whether it had been set by the longshoremen, because of the nondelegable duty owed by the vessel to the longshoremen. The majority of the court below dismissed this contention as being without merit and without further comment. Chief Judge Biggs dissented upon the ground that the shipowner should have been held liable for the defective condition of the rigging, even though it had been set by the longshoremen, under the rulings of this court in *Petterson v. Alaska S. S. Co.*, 205 F. 2d, aff'd per curiam 347 U. S. 396, and *Seas Shipping Company v. Sieracki*, 328 U. S. 85, and the holding of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First Point: The Decision of the Court Below Violates the Rule Laid Down by This Court in Petterson v. Alaska S. S. Co., 347 U. S. 396; Rogers v. U. S. Lines, 347 U. S. 984; Seas Shipping Company v. Sieracki, 328 U. S. 85; and Pope and Talbot v. Hawn, 346 U. S. 406, and It Is in Direct Conflict With the Decision of the Court of Appeals for the Second Circuit in Grillea v. United States, 232 F. 2d 919, All of Which Hold to the Basic Maritime Principle That a Shipowner May Not Circumvent His Absolute and Non-Delegable Duty With Respect to the Vessel and Its Equipment by Attempting to Delegate to a Stevedore Contractor the Responsibility of Providing, Rigging and Maintaining the Ship's Gear.

Petitioner's cause of action is based upon the fundamental proposition that it is the shipowner's *absolute and non-delegable* obligation to provide the longshoremen engaged in the ship's service with a safe and seaworthy vessel and equipment, and that, consequently, *the shipowner is not free to nullify his duty by parcelling out his operations to intermediary employers whose sole business is to temporarily take over portions of the ship's work while in port,* or by other devices which would strip the men performing its service of their historic protection. Translated into the context of the case at bar, this means that irrespective of the convenience or desires of the shipowner, the maritime law fastens upon him the responsibility for any defect, insufficiency or other unsafe condition of the unloading gear necessary to carry out the ship's enterprise, and that this responsibility may not be avoided by the commercially expedient device of parcelling out to shoreside contractors the various phases of the ship's business in port. *Whatever concurrent duty the law may impose upon these intermedi-*

ary employers, and whatever concurrent fault may be attributable to them, the shipowner's responsibility remains constant and unaffected. This proposition is spelled out in so many words by this court in its landmark decision in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099, which was the culmination of a long and troubled history in the field of litigation involving the rights of longshoremen against vessels by whom they were not employed, but for whom they were performing work essential to the vessel's enterprise, work which was formerly done, in the main, by seamen who were members of the crew. Without reviewing it in detail here, suffice it to say that its history is punctuated by numerous attempts on the part of the shipowners to nullify and restrict the scope of their liability, and to shift to others their traditional obligations. These attempts have been marked in the main by restrictive and artificial distinctions: "refinements" which, as this court aptly characterized in a related connection, "cut the heart from a protection to which they are wholly foreign in aim and effect." *Aguilar v. Standard Oil Co.*, 318 U. S. 724, at 736. The attempts have generally failed before this court, and before those federal appellate courts which rightly gauged the trend and policy of the decisions preceding Sieracki, particularly the decisions in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208; *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. Ed. 157; and *Uravic v. Jarka Co.*, 282 U. S. 234, 75 L. Ed. 312. As this court pointed out in *Sieracki*, (footnote 16, U. S. p. 98, L. Ed. p. 1108):

> "It is in relation to liability for personal injury or death arising in the course of his employment on the ship that the policy of our law has been most favorable to the stevedore's claims."

This policy, rooted in the practical necessities of the maritime trade, is based in great measure upon the realistic recognition that except for the technical aspects of the relation-

ship brought about by modern specialization in the maritime industry, the harborworker, though intermediately employed, is in truth and fact a servant of the ship upon which he performs his labors, is subject to the same risks and hazards as are the members of the crew, and is as helpless to discover and avoid them; he is therefore entitled to the same protections so far as these are consistent with his relation to the vessel. This policy is predicated upon the further explicit recognition that any toleration of division of responsibility as between the ship and those intermediary employers who undertake to perform portions of the ship's work will result, in the first instance, in a progressive evasion of responsibility, and ultimately may leave the injured longshoreman without relief altogether.

Before the era of "increasing commerce and the demand for rapidity and special skill" (*Atlantic Transport Co. v. Imbrovek, supra,* 234 U. S. 52, 61, 58 L. Ed. 1208, 1213) virtually all of the ship's work was performed by the ship's crew. The traditional protections afforded the crew extended equally to the work of loading, unloading, repairing and refitting the vessel and were equally applicable whether the ship was at sea or in port. Upon proper performance of the work, whether navigational or non-navigational in character, depended in large measure the safe carrying of passengers and cargo and the safety of the ship itself. It was a service absolutely necessary to enable the ship to discharge its maritime duty. The ship was bound to furnish the crew with a reasonably safe place to work, and a safe and seaworthy vessel, an obligation which encompassed within its scope the diverse procedures involved in loading, unloading, repairing and refitting the vessel. As the need for specialization increased, shipowners developed the practice of hiring men for the specific purpose of tending to these phases of the vessel's enterprise. In so doing the shipowner did not relieve himself of his traditional obligations. For these men, though not members of the crew, were doing precisely the work of the crew, as necessary to

the accomplishment of the ship's enterprise as navigation itself. Rightly, these men looked to the vessel for the safe accomplishment of their work; safe in a comparative sense, only, for, as graphically expressed in *The H. A. Scandrett*, 87 F. 2d 708, 711: "A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put." No one is in a better position than the vessel to take such proper and adequate means to reduce the hazard as the nature of the instrumentality, and the enterprise in which she is engaged, will reasonably allow. As this court said in Sieracki, *supra* (U. S. p. 94, L. Ed. pp. 1104-06): "Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its costs." Thus it is that it has been the shipowner's traditional responsibility to provide those engaged in the ship's service, whether members of the crew or not, with a safe and seaworthy vessel—a duty which embraces within its scope a safe place for the performance of the work,[2] as well as to supply and *keep in order proper equipment for its execution.*[3]

Nor has the present stage of maritime practice of hiring so-called independent contractors, who, in turn, are technically the employers of the men who now perform certain phases of the ship's work, altered the legal incidents of the underlying relationship in the slightest degree. The shipowner's traditional obligation remains, and he cannot insulate his liability for its breach by the device of an intermediate employer, for the obligation is non-delegable. The

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2. *The Joseph B. Thomas*, 86 F. 658, 660 (C. A. 9); *The No. 34*, 25 F. 2d 602, 604 (C. A. 2); *The Spokane*, 294 F. 242, 255 (C. A. 2), cert. den. 264 U. S. 583; *The Omsk*, 266 F. 200, 202 (C. A. 4).

3. *Glover v. Compagnie Generale Transatlantique*, 103 F. 2d 557 (C. A. 5); *The Nako Maru*, 1938 AMC 770 (E. D. Pa.), reversed on other grounds in 101 F. 2d 716, cert. den. 307 U. S. 641; *Mahnich v. Southern Steamship Co.*, 321 U. S. 96, 88 L. Ed. 661; *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 764.

device is of benefit primarily to the shipowner, who derives the advantages of specialized skill without increasing his maritime obligations. There are no reasons of policy to dilute these obligations nor any considerations of equity which could possibly serve as a basis for permitting the shipowner to thus slough off his responsibilities.

That the shipowner finds it commercially expedient to farm out various longshore operations involved in a vessel's enterprise is understandable. To permit him, on this account, to escape his traditional responsibilities to the men who perform the ship's work would be indefensible:

> ". . . he is at liberty to conduct his business by securing the advantage of specialization in labor and skill brought about by modern divisions of labor. *He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of more general scope. To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do.*" (Emphasis supplied.) *Seas Shipping Co. v. Sieracki*, supra, 328 U. S. 85, 100, 90 L. Ed. 1099, 1109.

The shipowner's obligation to supply a seaworthy vessel and safe and seaworthy appliances is absolute and nondelegable. *Seas Shipping Co. v. Sieracki*, supra; *Mahnich v. Southern Steamship Company*, supra; *Sutherland v. Buckeye Cotton Oil Co.*, 259 F. 909. It is likewise continuing in character. As this court pointed out in the *Mahnich* case, supra, at U. S. p. 104, L. Ed. p. 567, quoting from *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 764, the owner's obligation is to "supply and *keep in order* the proper appliances appurtenant to the ship." (Emphasis in the original.) See also *Pacific American Fisheries v. Hoof*, 291 F. 306, cert. den. 263 U. S. 712; *The Dredge No. 15*, 264 F. 135.

The sole basis upon which the holding of the lower court exonerating the shipowner rests is that the shipowner temporarily surrendered *control* of the vessel to the intermediate employer. To allow the "control" theory would require a holding that although the obligation is nondelegable, it may nevertheless be delegated to intermediary employers; and that although the obligation of the owner is to *supply* as well as to *keep in order* the appliances appurtenant to the ship, this obligation ceases at the very moment when it becomes most necessary, that is to say, at the very moment when the ship and its appliances must be used for the purposes for which they are intended. Under the "control" theory the shipowner is thought to be relieved from the obligation solely and precisely for the asserted reason that during the time the intermediary employers are working aboard the ship he is deprived of control over the vessel and its appliances: that the intermediary employer's "control" during these operations is such that it completely divests the owner of the ability to meet his obligations. Yet, had a member of the crew been injured under the circumstances here disclosed, instead of the petitioner, the shipowner's liability would have been clear for *"The shipowner's responsibility to furnish a safe place for the crew continues through any hazard created by longshoremen in loading the cargo. . . ." Shields v. United States,* 175 F. 2d 743. This doctrine has been, in fact, equally applied to longshore workers: *Grillo v. Royal Norwegian Government,* 139 F. 2d 237 (C. A. 2); *Rich v. United States,* 177 F. 2d 688, 691 (C. A. 2); *Petterson v. Alaska S. S. Co.,* supra; *Grillea v. U. S.,* 232 F. 2d 919. The truth of the matter is that both in fact as well as in contemplation of law, dominant control over the ship and its activities remains in the shipowner precisely because as to all matters relating to the ship's enterprise the right as well as the duty of ultimate management and control are firmly and irrevocably lodged in the shipowner. While a measure of control over the unloading gear was undoubtedly possessed by Nacirema in the sense

that its employees were handling it at the time of the accident, this is not the type of control that can legally divest the shipowner of his paramount and ultimate right of exclusive control, nor of the non-delegable obligations incident thereto. The test is not whether, in the particular instance, control is actually exercised by the ship, but whether the *right of control* exists.

This principle, as outlined in the *Sieracki* case was again attacked in *Pope & Talbot v. Hawn*, 346 U. S. 406, upon the ground that the longshoremen were not entitled to the same status as the seamen, who are members of the crew. This court in the Hawn case unequivocally rejected this further attempt to create a distinction between the members of the crew and the longshoremen, stating (U. S. p. 412, L. Ed. p. 152):

> "We are asked to reverse this judgment by overruling our holding in Seas Shipping Co. v. Sieracki (US) supra. Sieracki, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. *That identical argument is repeated here. We reject it again and adhere to Sieracki.*" (Emphasis supplied.)

Following the Sieracki and Hawn decisions, a number of conflicting decisions were rendered by the Courts of Appeals for the Second and Third Circuits. In *Read v. United States*, 201 F. 2d 758 (C. A. 3), the vessel was held liable to a longshoreman under the shipowner's non-delegable duty, despite the fact that under a contractual arrangement the duty to supply lighting facilities had been "delegated" to the longshoreman's employer. In *Brabazon v. Belships*

Co., 202 F. 2d 904 (C. A. 3) a longshoreman was injured in the hold of the vessel when a board upon which he was walking collapsed. The board was not supplied by the ship and its origin was undetermined. The court rejected the shipowner's principal contention (202 F. 2d at 906) "that the hold having been safe when loading operations began, the shipowner thereafter has no affirmative responsibility whatever for shipboard hazards not of his own creation that may come into existence in the independent contractor's work area during the course of loading," and imposed responsibility on the vessel. The Court held that even as to liability for negligence the stated circumstances do not operate as a general rule of absolution from responsibility. The same Court of Appeals, however, reached a different conclusion in *Rogers v. U. S. Lines*, supra 205 F. 2d 57, a case very similar to the one at bar. There the stevedores were engaged in unloading ore from the holds of the vessel onto railroad cars on the pier alongside. The booms and other tackle were so set by the stevedores that the cable from the winch, which had been furnished by the stevedore, was not long enough to extend all the way into the wings of the ship. As the ore tub was lowered down and swung in toward the wings, the cable ran out its full length and then started to rewind as the drum of the winch kept revolving. This caused the tub to swing back across the hold, striking and seriously injuring one of the longshoremen. The Court of Appeals for the Third Circuit held that the ship could not be liable because the cable which was not long enough had been furnished and rigged by the stevedore. The opinion of the Court of Appeals, which was reversed by this court without opinion at 347 U. S. 984, discloses unsound reasoning as follows (pages 57-58):

> "Admittedly then, the alleged unseaworthy condition was not created by the ship. *The runner was owned, produced and fastened to the winch by Lavino, which was in charge of and performing the unloading*

> *operation. And there is no indication that the ship sanctioned its use or even knew of its existence.* The statement that the vessel adopted the runner as an appurtenance is simply not justified by the record. In accordance with the well accepted practice the discharge of the cargo had been turned over to Lavino Company, an experienced master stevedore concern. The latter had taken the assignment and proceeded to carry it out. In the course of so doing and for its purposes it hooked up one of its own wires and thereafter used it in connection with the other rigging. While there is strong evidence of Lavino's negligence through its employees, particularly the winch operator, the resolution of that question is not pertinent to this appeal. Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment should not, for the reason urged, be disturbed."

This court reversed that decision per curiam without opinion on the same day that it affirmed the decision of the Court of Appeals for the Ninth Circuit in *Petterson v. Alaska S. S. Co., supra,* 347 U. S. 396. The Court of Appeals has again committed exactly the same error in the case at bar as it did in the *Rogers* case.

This court's decision in *Petterson v. Alaska S. S. Co., supra,* 347 U. S. 396, is likewise in square conflict with that of the court below. There the stevedores brought on board certain of their own gear, including a defective block, and rigged it along with the ship's equipment for the unloading operation. The block broke in the course of discharging the cargo, causing injury to one of the longshoremen. The question before the court was whether or not the ship was responsible for the unsafe condition of the gear as rigged by the stevedores. In that case, as in the *Rogers* case, the shipowner interposed the "relinquishment of control"

defense, contending that once he had provided a seaworthy ship to the stevedores, he could not be held liable for any unsafe conditions thereafter occurring. The Court of Appeals for the Ninth Circuit, in considering this issue, said (p. 479):

> "Appellee argues that even if the unseaworthiness of the block is shown, it is not liable because control of that portion of the ship upon which Petterson was working had been surrendered to Stevedoring Co. In so contending they rely, as did the court below in its decision, upon the 'relinquishment of control' doctrine which has been adopted in the Second and Third Circuits. That doctrine is that a shipowner is under an initial duty to provide a seaworthy ship; but that this duty is a concomitant of control, and the shipowner is not liable for unseaworthiness which arises after control of the ship, or that part which includes the unseaworthy condition, has been surrendered to the stevedores."
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> (P. 480)
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> "Judge Hand was correct in his interpretation of the Sieracki case as assimilating a longshoreman to the position of a seaman insofar as injuries received while on board ship are concerned. This is shown by the reference in the Sieracki opinion to the 'common core of policy which has been controlling' which is found running through the decisions permitting longshoremen to recover from shipowners 'that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner.' 328 U. S. at page 99, 66 S. Ct. at page 879. *The duty of the shipowner* is described, 328 U. S. at page 95, 66 S. Ct. at page 877, as '*a form*

> *of absolute duty owing to all within the range of its humanitarian policy'* and further, 328 U. S. at page 100, 66 S. Ct. at page 880, as *'peculiarly and exclusively the obligation of the owner. * * * one he cannot delegate.'* It cannot be assumed that the Court meant that the stevedore should lose this protection merely because his immediate employer had temporarily assumed control of a portion of the ship without becoming the owner pro hac vice." (Emphasis supplied.)

Regarding the so-called "relinquishment of control doctrine" the court went on to say (p. 480):

> "That this absolute duty is also owed to stevedores is clearly shown by the Sieracki case. See also Kulukundis v. Strand, 9 Cir., 202 F. 2d 708, 710. *The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here.*" (Emphasis supplied.)

That decision was affirmed per curiam by this court upon the authority of *Seas Shipping Company v. Sieracki, supra,* 328 U. S. 85, and *Pope and Talbot v. Hawn,* 346 U. S. 406.

This court in the *Petterson* and *Rogers* cases, thus, again rejected the further attempt to drive a wedge between the seaman and the longshoreman in connection with the shipowner's duty under the warranty of seaworthiness. Implicit in those two decisions of this court is the proposition that longshoremen are assimilated to the position of seamen and they share equally the full benefits of the warranty of seaworthiness. The shipowner's duty is to "supply *and keep in order* the proper appliances appurtenant to the ship." *Mahnich v. Southern Steamship Co., supra,* at U. S. page 104; *The Osceola,* 189 U. S. 158, 175.

This duty is neither limited by concepts of negligence nor contractual in character, and "is peculiarly and exclusively the obligation of the owner. . . . *one he cannot delegate.*" *Seas Shipping Company v. Sieracki, supra,* at U. S. pp. 94-95, 100.

The decision of the court below in the instant case is directly contra to the foregoing decisions and principles. It is undisputed that the condition of the rigging was unsafe. Indeed, the Court of Appeals held that the accident resulted from the unsafe condition of the rigging. The Court of Appeals should, therefore, have affirmed the decision of the trial court upon this fact alone, since the shipowner cannot be insulated from liability because this unsafe condition was created by the stevedores. The shipowner's duty in this respect is non-delegable.

The Conflict Between the Court Below and the Court of Appeals For the Second Circuit.

Prior to the Petterson decision, there was a lack of consistency in the decisions of the Second Circuit, as there was in the Third. In one line of cases, the court held that the shipowner's obligation of seaworthiness was limited to providing an *initially* seaworthy vessel which terminated the moment "control of the vessel was surrendered to the stevedore." *Lynch v. United States,* 163 F. 2d 25, cert. den. 326 U. S. 743; *Lauro v. United States,* 162 F. 2d 32. Opposed to these cases is the opinion of Judge Learned Hand in the *Lauro* case where although concurring in the result because the ship was initially unseaworthy, he expressed the same conviction that under the decision of this court in *Seas Shipping Company v. Sieracki, supra,* and *The Osceola, supra,* the shipowner's duty continues throughout the period the stevedores are aboard the vessel. Consistent with this view is the Second Circuit decision in *Grillo v. Royal Norwegian Government,* 139 F. 2d 237, where the sole defense to a longshoreman's

action for personal injuries, sustained because of a defective ladder over the ship's side, was that the ladder was not shown to have been part of the gear or to have been placed there by any authorized person on behalf of the ship. That defense was rejected. See also *Standard Oil Co. v. Robins Drydock & Repair Co.*, 25 F. 2d 339, and *Larsen v. United States*, 72 F. Supp. 137.

Following the *Petterson* and *Rogers* decisions the Court of Appeals for the Second Circuit consistently conformed to the principles of those cases. The specific subject matter was again presented to the Second Circuit in *Grillea v. United States, supra*, 232 F. 2d 919. There the longshoremen were engaged in replacing the hatch boards after the work in the hold had been completed. As the hatch boards were set in place upon the beams, one of the boards came to rest upon a padeye protruding above the top of the beam, causing the board to be unsteady. As the longshoremen continued to replace the other hatch boards, one of the longshoremen was caused to lose his balance when he stepped upon the unsteady board, as a result of which he fell into the hold suffering injury. The court held the shipowner liable for the unsafe condition on the basis of this court's decisions in *Sieracki, Hawn* and *Petterson* cases. The court stated that implicit in those decisions is the principle that it is the shipowner's nondelegable duty throughout the course of the vessel's operations to provide and keep in order a seaworthy vessel and equipment, and it is no defense to the shipowner that the condition may have been created by the longshoremen. Judge Learned Hand, speaking for the court, held further than the shipowner would be liable for the unsafe condition, even if it had been caused by the injured man himself, although under the latter situation the recovery would be reduced *pro tanto* under the comparative negligence rule. The opinion of the Court of Appeals states (p. 922):

"The claim is based upon the theory that, as soon as the wrong hatch cover was placed over the 'pad-eye' the ship became pro tanto unseaworthy, and that, when the libellant stepped upon it and it gave way beneath him, he came within the decision of the Supreme Court in Seas Shipping Company v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, which extended the doctrine of The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760, to longshoremen, while loading or discharging a ship. The respondents answer that a ship's seaworthiness has from time immemorial been measured by her fitness for the service in hull, gear and stowage, that in all these respects the ship at bar was well provided, and that the libellant's injuries were due solely to the negligence of himself or his companion, Di Donna, or both, in selecting the wrong hatch cover to place over the 'padeye'.

* * *

(pp. 922-923)

". . . In the case at bar although the libellant and his companion, Di Donna, had been those who laid the wrong hatch cover over the 'pad-eye' only a short time before he fell, we think that enough time had elapsed to result in unseaworthiness. The cover was one of two or three that they had already put in place on the after section of the hatch; *it had become part of the platform across which the two walked to gain access to the middle section on which they were going to place another cover. The misplaced cover had become as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.* It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing inconsistent with the nature of the

liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect.

* * *

"The Court recently reaffirmed this doctrine in Alaska S. S. Co. v. Petterson, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, and we have since followed suit in Poignant v. United States, 2 Cir., 225 F. 2d 595. Seas Shipping Co. v. Sieracki, supra, also held that the contributory negligence of a seaman is not a defense to an action based on the ship's unseaworthiness; although apparently it is a proper factor in fixing the amount of the recovery. Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143."

It is apparent that the decision of the court below collides head on with the decisions of this court in the *Sieracki, Hawn* and *Petterson* cases, and with the decision of the Court of Appeals for the Second Circuit in the *Grillea* case. The instrumentality which caused the accident in this case was the defective rigging of the boom and tackle for the purpose of unloading the lumber. That it was a defective and dangerous condition was specifically found by both the trial court and the Court of Appeals; that this defective instrumentality was a proximate cause of the accident was likewise found by both courts below. Under these circumstances, it was immaterial that the defective condition was rigged by the longshoremen. The shipowner should have been held liable in any event because of its non-delegable duty.

Chief Judge Biggs, in dissenting, pointed out that the holding of the Court of Appeals is in direct conflict with the *Sieracki, Hawn, Petterson* and *Grillea* cases, and that the principles enunciated in those cases (infra, p. 37):

"Would require the holding that the ship was liable for the wrongful positioning of the boom and

the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine to the effect that *a 'seaworthy' round peg placed in a 'seaworthy' square hole will render the whole unseaworthy.*" (Emphasis supplied.)

Upon this ground alone, certiorari should be granted and the decision of the court below reversed.

Second Point: The Court of Appeals Reversed the Findings of the Trial Court Without Applying the Standard That Such Findings Must Be Clearly Erroneous Upon a Review of the Entire Record.

In reviewing a judgment of a trial court sitting in admiralty without a jury, a Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedures. *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6; *Boston Ins. Co. v. Dehydrating Process Co.*, 204 F. 2d 441, 444 (CA 1); *C. J. Dick Towing Co. v. The Leo*, 202 F. 2d 850, 854 (CA 5); *Union Carbide & Carbon Corp v. United States*, 200 F. 2d 908, 910 (CA 2); *Koehler v. United States*, 187 F. 2d 933, 936 (CA 7).

A review of the decision below upon this ground is sought not because the Court of Appeals chose certain evidence as opposed to other evidence, but because in reversing the findings of the trial court it adopted a theory which is not based upon any evidence in the record, and, in fact, is in direct conflict with all of the evidence in the record. Parenthetically, it may be stated that this court stands in review in precisely the same position as did the Court of Appeals. *McAllister v. United States, supra*, at U. S. 20-21, L. Ed. 24. If there be competent evidence, unless the court is left with the firm conviction upon a review of the entire

record that a mistake has been made, the findings of the trial court must stand. *McAllister v. United States, supra,* at U. S. page 20, L. Ed. page 24.

In the *McAllister* case, a ship's officer sought recovery from the vessel owner for polio, allegedly contracted as a result of the latter's negligence. The District Court found that the shipowner was negligent, but the Court of Appeals reversed on the ground that this negligence was not shown to have been the proximate cause of the disease. The Supreme Court, after stating the rule regarding the scope and nature of review, concluded that although the Court of Appeals had recognized the proper standard for review, it erred, nevertheless, in the application of that standard. In this connection, this court said (U. S. pp. 20-21, L. Ed. p. 24):

> "We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard. In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The question, therefore, is whether the findings of the District Court are *clearly erroneous.*" (Emphasis supplied.)

Upon its own review of the record, this court concluded (U. S. pp. 22-23, L. Ed. p. 25):

> "Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. *But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based*

upon such evidence is clearly erroneous." (Emphasis supplied.)

The findings of the district judge were, therefore, reinstated, despite the fact that the Court of Appeals reached a different view. The controlling factor was not whether there was evidence to support the Court of Appeals' view, but whether the District Court's findings were clearly erroneous.

The case at bar seeks a review upon the strict legal ground that the Court of Appeals did not follow the standard prescribed by this court for the review of the trial court's findings in that its decision in this regard is based upon a unique theory which finds no support in the record and which is, in fact, contradicted by the testimony of all witnesses, including the respondents'.

In reversing the trial court's finding that the winch was unseaworthy, the Court of Appeals said that the finding *was* supported by the evidence but that, nevertheless, the application of its own mathematical formula to the "undisputed facts requires the rejection of that opinion and the acceptance of other testimony."[4] The "undisputed facts" upon which the court below relied, and upon which the entire mathematical formula is based, as stated by the court below is (infra, p. 33):

> "The testimony was clear and undisputed that the hoisting gear of the kind in suit is rated to lift a load not more than one-fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load uti-

4. The court also indicated that a Coast Guard Regulation 46 C. F. R. Part 111.45-20 (b2) made the setting of the cut-off device at twice the rated load permissive, but this regulation does not refer to ships' winches expressly or impliedly. It has to do with current supplied to lights and water coolers, etc., not involving any strain on gear as is involved in the operation of a ship's winch. Inquiry at the Coast Guard and the Maritime Administration, which designs the plans for the construction of vessels and gear discloses that there is no regulation which governs the cut-off devices on the ship's winches.

lizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage."

It will immediately be apparent that the court labored under a complete misunderstanding regarding the so-called undisputed facts, and, moreover, the mathematical formula which it introduced into the case is not only contrary to all the evidence in the record, but it is most defective from the scientific point of view.

The statement that the hoisting gear is rated to lift a load of not more than one-fifth of the strength of the cable itself is not supported but is contradicted by the evidence. At the outset, it must first be noted that the cable is an integral part of the "hoisting gear" and the cable as well as all the rest of the gear used in the hoisting operation had a rated safe working capacity of *three* tons. How did the Court of Appeals reach the conclusion that it had a fifteen ton capacity with the ability to *adequately* withstand a strain of fifteen tons? This was erroneously inferred from the testimony of witnesses that the gear was designed with a factor of safety five times its safe working capacity. Without alluding further to the testimony, the court *assumed* that the *factor of safety* means *safe working capacity*. This finding which the court below referred to as undisputed fact is absolutely contrary to the testimony of the witnesses, as well as to generally accepted scientific principles. The experts testified that the factor of safety related to the "*breaking point*" of the cable and not its working *capacity*. The fallacy in the lower court's assumption on this point is demonstrated forcibly by the respondents' own experts. Isaac Stewart, an expert witness who appeared for the respondent vessel, testified as follows (Libellant's Supplemental Appendix 16b):

"The Court: May I interrupt you a moment, Mr. Brass? While we are still on this safe working load,

did I understand you to say that the safe working load of a wire rope is one-fifth of its tensile strength?

The Witness: Breaking load, yes, that is a new rope.

The Court: Now as the deterioration increases in the wire rope the breaking load decreases, does it not?

The Witness: That is right."

Another expert, Walter J. Byrne, testified on behalf of the impleaded respondent in these terms, which likewise destroy the very foundation upon which the extraordinary theory of the lower court rests (N. T. 1900):

"Q. Mr. Byrne, what is the factor of safety on a runner?

A. Five.

Q. Five what?

A. In order to determine the safe working load you divide the breaking strength by five.

Q. In other words, the safety—the safe working load——

A. Is one-fifth.

Q. And if you say it is a hundred per cent over the working load it is a drastic condition. Is that what you are testifying to now?

A. Yes.

* * *

(N. T. 1901)

Q. In other words, you say it is drastic even though the safe working load is one-fifth of the breaking load, is that right?

A. That is correct. I am a safety engineer. One pound over the safe working load in my opinion is bad. (N. T. 1902-03)

The Court: While you are thinking of the form of your question, let me ask this question: As I understand it, this safe working load is what its name implies, namely, a limitation on the recommended load to

which a member of the gear or unit of the gear should be subjected so as to afford a maximum safety tolerance or cushion.

The Witness: Yes, in order to take—also take into account deficiencies, things of that kind, which might occur.

The Court: If you have a given breaking strength of a wire and you have computed the safe working load of that wire as one-fifth of that breaking strength, if by reason of the condition of the wire the breaking strength is reduced, is the safe working load proportionately reduced? Do you understand my question?

The Witness: I do, your Honor, and of course there again it is from the practical aspect. If the breaking strength is substantially reduced due to wear or due to other factors, obviously the safe working load has to be reduced.

I mean it would be inconceivable to think otherwise, that if the wire had deteriorated to the extent that the breaking strain has been weakened, it would be foolhardy to continue the original one-fifth of sound wire breaking strain . . ."

It is thus apparent that the court below not only erred in confusing "factor of safety" with "working capacity", but also that its novel theory, which is the product of its own reasoning, is fundamentally unsound to the point where it may be so judicially noted. The Court of Appeals went outside the record in evolving that theory. This court may, therefore, take judicial notice of generally recognized scientific principles in examining into it.

In the manufacture of materials which are intended to be subject to stress and strain, the manufacturer must determine the safe capacity of the product, or, to put it otherwise, the amount of strain that it can adeqhately withstand without suffering any irreversible damage. In arriving at this figure, the manufacturer will test the product by exert-

ing more and more strain until the product finally breaks. Obviously, before this breaking point is reached the substance or body of the product begins to suffer progressively more and more damage as the strain increases, until the entire body of the product completely snaps. A simple experiment with a length of twine or a piece of wood will illustrate the point. If the strain is stopped before the breaking point is reached, the product may, nevertheless, be weakened by a partial break internally or externally, or any number of fibers may be torn, depending upon how close to the breaking point the strain is continued. This would leave the product in a weakened condition and thereby reduce the level of the breaking point. The manufacturer must find the point which is safely below that where the progressive breaking begins. So long as that point is not exceeded the product can be used over and over again without damaging and weakening it. The factor of safety means exactly that. It does not mean that the product has a safe working capacity at a higher level. That would be testing the risk. On the contrary, when the manufacturer specifies on the product, as here, that the gear has a safe working capacity of three tons, it means that it has been tested and that it may be dangerous to apply a greater strain because the progressive damage to the product begins somewhere above that level. The safe capacity of the product ends at the point that the manufacturer specifies. The level of the breaking point under no circumstances represents the safe capacity of the gear as the Court of Appeals reasoned, contrary to the evidence.

The trial judge found that the topping lift cable which was manufactured with a safe work load capacity of three tons was in fact subjected to an excessive strain of between 17 and 21 tons; that this excessive strain was due to two factors: (a) the excessive setting of the cut-off device which failed to stop the winch when the weight of the load exceeded three tons; and (b) the defective condition of the rigging which placed a somewhat greater strain on the topping

lift than on the other gear; that these factors combined to cause the cable to break. That court held the winch to be unseaworthy and a material contributing factor to the accident. Those findings are fully supported by competent evidence, and the record does not sustain any conclusion that they are clearly erroneous.

The Court of Appeals did not hold that the trial court's findings were clearly erroneous, but it simply substituted its judgment for that of the trial judge. In so doing, it violated the standard laid down by this court in the *McAllister* case. The record demonstrates that the findings of the trial judge are not "clearly erroneous" and the Court of Appeals committed error in reversing them.

CONCLUSION.

The issues involved herein are of national importance. Prior cases in the various circuits reveal that the issues herein are frequent occurrences and they affect the everyday work routine of all longshoremen in every port in the country. The decision of the Court of Appeals is a departure from the rulings made by this court, and if allowed to stand will have an injurious effect on the uniform application of the doctrines enunciated by this court.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
SIDNEY A. BRASS,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,138
No. 12,139
No. 12,140

JOHN H. CRUMADY, APPELLANT IN No. 12,138

v.

JOACHIM HENDRIK FISSER, HER ENGINES, TACKLE, APPAREL, ETC., AND JOACHIM HENDRIK FISSER AND/OR HENDRIK FISSER,

Respondents

v.

NACIREMA OPERATING CO., INC., IMPLEADED RESPONDENT APPELLANT IN No. 12,140
HENDRIK FISSER AKTIEN GESSELSCHAFT, CLAIMANT-APPELLANT IN 12,139

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 13, 1957

Before MARIS, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed September 30, 1957)

HASTIE, *Circuit Judge.*

Proceeding in rem against the ship Joachim Hendrik Fisser, the libellant Crumady has sued in admiralty to hold the ship and its owners responsible for personal injuries suffered by him while working on the ship as a stevedore employed by Nacirema Operating Co. in the unloading of the vessel at a berth in Port Newark, New Jersey. The respondent impleaded libellant's employer, Nacirema Operating Co., seeking thereby to obtain indemnification for any loss it might suffer through this suit.

After full hearing the court held the ship liable, ruling that one factor which contributed to the accident was the unseaworthiness of certain equipment of the ship. The court also allowed the ship to recover over against Nacirema, the party whose negligence, in the court's view, was the "sole, active or primary cause" of the accident.

Each of the parties has appealed. The ship challenges the ruling as to unseaworthiness. Nacirema claims that in any event there was no basis for holding it to indemnify the ship. The libellant complains that the amount of the award was erroneously determined and grossly inadequate.

We consider first the way the issue of unseaworthiness arose and was determined. The libel itself asserted a claim in admiralty for injury caused by the negligence of a ship and its owners, and nothing else.[1] There was no claim that unseaworthiness caused the accident or even that any unseaworthy condition existed. However, discussion at a pre-trial conference seems to have led the court to conclude that libellant's contentions included a claim predicated upon unseaworthiness. In any event, the transcript of the trial judge's statement at the conclusion of the pre-trial

1. Since *Pope & Talbot, Inc. v. Hawn*, 1953, 236 U. S. 406, it has been authoritatively established, if not unanimously agreed, that admiralty affords an injured workman so situated as libellant two distinct causes against the ship, one for negligent injury and the other for injury caused by the unseaworthiness of the vessel, although, of course, there can be only one recovery of damages for the same personal injuries.

conference shows that he undertook to frame the issues, saying, apparently with the acquiescence of the parties, that the libellant "contends in effect that the injuries complained of resulted from the unseaworthiness of the vessel. . . ." In addition, the court made it clear that the structure alleged to have been unseaworthy was a cable or topping-lift which parted causing a boom which it supported to fall upon the libellant. Thereafter, libellant's proof was directed at establishing that the topping-lift was worn and defective and, for that reason, parted under the strain of lifting cargo which sound gear would have withstood.

The evidence relevant to this theory of liability was conflicting and the court, with adequate basis in the record, found as a fact that the topping-lift was not defective but "was adequate and proper for the loads for which the rest of the gear was designed and intended". The court also found quite properly that Nacirema's employees, libellant's fellow stevedores, were negligent in their conduct of the unloading operation. More particularly, attempting to lift long and heavy timber from the hold they permitted the load to catch under the coaming at the margin of the hatch from which it was being removed. In addition, though forbidden to change the position of the head of the boom which the crew of the vessel had placed over the center of the hatch, they had changed the attachment of the preventer and guy which controlled the position of the boom so that the head of the boom was no longer over any part of the hatch but had been moved a distance to port of the hatch opening. The excessive and abnormal strain which this incorrect procedure imposed upon the topping-lift will be discussed later. It suffices to point out now that the court with justification attributed the accident primarily to this negligence of Nacirema.

But having thus eliminated the basis of unseaworthiness formulated at pre-trial, the court found and adopted a new theory of the ship's unseaworthiness and responsi-

bility which libellant had not pleaded and, so far as we can determine, had not attempted to establish in his proof. An understanding of the court's reasoning requires the consideration of additional circumstances not heretofore mentioned.

The gear being used at the time of the accident was rated and approved to lift a load of three tons or less. In the actual unloading operation a cable, called a cargo runner, was attached to the object to be lifted from the hold. This runner extended upward over a block at the end of a boom high above the hold and thence to and around a winch powered by an electric motor. The electrical equipment in this case included an automatic circuit breaker which stopped the flow of power to the winch whenever the current built up beyond the amperage for which the device had been set. Witnesses were asked to relate the cut off amperage to the strain imposed upon the winch by the load it was lifting. The witnesses agreed that the cut off was set so that if the motor should be required to overcome a strain on the cargo runner somewhat in excess of six tons the current would quickly build up to the setting of the circuit breaker and the motor would automatically cut off. In this case, the motor did cut off, apparently just before the topping-lift parted.

The libellant seems to have introduced testimony about the cut off device in an effort to show that the power was cut off before the gear was subjected to any greater strain that it should have been able to withstand. But in analyzing this testimony, much of which was a rather confused discussion of "load" and "torque" and other electrical concepts induced by questions addressed to the witnesses as though the concepts were mechanical rather than electrical, the court concluded that it was unsafe practice, rendering the gear unseaworthy, to have the cut off set so that the circuit would not be broken until the tension in the cargo runner should exceed six tons. In other words, the court thought the rating of the gear to handle a cargo

load of three tons indicated that it was unsafe to have the circuit breaker so set that the cargo runner might be subjected to a six ton strain.

While the court's reasoning was in accord with an opinion expressed by a witness, the application of mathematics to the undisputed facts requires the rejection of that opinion and the acceptance of other testimony, based in part upon a Coast Guard standard for the setting of such a control, indicating that the setting of the cut off device was entirely safe and proper. The testimony was clear and undisputed that hoisting gear of the kind in suit is rated to lift a load not more than one fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage. Indeed, as the testimony shows and the laws of physics teach, inertia, friction and the normal circumstances of operation make it necessary that substantially more than a three ton strain be imposed upon the gear before a three ton load can be lifted. Thus, the electrical equipment must and safely can impose a strain on the runner much greater than the weight to be lifted.

This was demonstrated by what happened in the present case. A strain of six tons or more on the cargo runner had no effect on that cable. The circuit breaker cut off the power at that point, while the strain was still well within the capacity of the cable. By the same token, if this operation had been conducted normally and properly the strain on the topping-lift would have been well within its capacity when the circuit breaker intervened. For this part of the gear also was rated to handle three tons of cargo and thus could withstand a fifteen ton strain.

The decisive fact, as the court found, it, was that the employees of Nacirema had so changed the position of the head of the boom as to seriously distort the normal com-

position of forces which is presented by a straight lifting operation. It was for this reason that the topping-lift was subjected to an enormous, abnormal and unanticipated strain. On the basis of expert testimony the court found as a fact that this strain was somewhere between seventeen and twenty-one tons, three or four times the strain then being imposed on the cargo runner and the winch.

This analysis leads to two conclusions. It was a proper finding that the negligence of the stevedores was "the sole active or primary cause" of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema "brought into play the unseaworthy condition of the vessel". The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose.[2] Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred.

A decree should have been and now must be entered denying the libellant recovery. In these circumstances we do not reach the substantial question raised by the impleaded respondent whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained.

The judgment will be reversed.

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2. *The Silvia*, 1898, 171 U. S. 462; *Doucette v. Vincent*, 1st Cir. 1952, 194 F. 2d 834; see *Berti v. Compagnie de Navigation Cyprien Fabre*, 2d Cir. 1954, 213 F. 2d 397, 400. *Cf. The Daisy*, 9th Cir. 1922, 282 Fed. 261.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:

IDA O. CRESKOFF,
Clerk.

September 30, 1957

OPINION OF THE COURT ON PETITION FOR REHEARING.

(Filed December 5, 1957.)

Before BIGGS, *Chief Judge*, and MARIS, STALEY and HASTIE, *Circuit Judges*.

PER CURIAM:

A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for rehearing is denied.

BIGGS, *Chief Judge*, dissenting.

My brother Hastie's succinct opinion expressing the majority view as to why the accident to Crumady occurred raises an issue which requires rehearing before the court *en banc*. The majority opinion correctly concludes that Crumady was injured because a seaworthy boom, topping lift and tackle were employed to lift cargo from the vessel's hold but because the boom and topping lift were wrongly positioned by the stevedoring crew too great a strain was put on the boom and topping lift causing the topping lift to break.

Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir. 1953), aff'd *per curiam* 347 U.S. 396 (1954), held that the responsibility of the ship owner was not shifted to the stevedoring crew because that crew brought on board and made use of a defective block which caused Petterson's injuries. The Court of Appeals for the Second Circuit in Grillea v. United States, 232 F. 2d 919 (1956), held that where longshoremen placed a seaworthy, but wrong, hatch-cover over a "pad-eye", and thereafter a longshoreman stepped on the hatch-cover which gave way under him, causing him serious injuries, the ship was liable. In the case at bar, it would ap-

pear that a logical and necessary extension of the principles enunciated in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), and in Petterson, would require the holding that the ship was liable for the wrongful positioning of the boom and the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine to the effect that a "seaworthy" round peg placed in a "seaworthy" square hole will render the whole unseaworthy. While it does not appear how long a time elapsed between the positioning of the boom and the topping lift and the occurrence of the accident in the case at bar, it is clear that some time necessarily elapsed.

For these reasons I conclude that rehearing should be had before the court *en banc*.

ORDER SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*, and MARIS, STALEY and HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated: December 5, 1957